No. 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Petitioner*

v.

AARON ZACKS and FLORENCE ZACKS

On Writ of Certiorari to the United States Court of Claims

MOTION OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF AMICUS CURIAE

GRANT W. WIPRUD
Attorney for Movant,
602 Transportation Building
Washington 6, D. C.

Of Counsel:

ROBERT T. MOLLOY
602 Transportation Building
Washington 6, D. C.

THOMAS O. BROKER
ROBERT G. BOES
Terminal Tower Building
Cleveland 1, Ohio

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Pursuant to Rule 42(3) of this Court's Rules, the above-named movant (known to the public and sometimes referred to herein as the "Nickel Plate Road") seeks leave of this Court to file a brief as *amicus curiae* in the instant case. The proposed brief, in printed form, is annexed to each of the forty copies of this motion filed herein.

As detailed below, movant's interests will be directly and substantially affected by the disposition of the instant case; and unless this Court receives and considers movant's proposed brief as *amicus curiae*, a question of law

will not be adequately presented by the parties although it is encompassed in the issue this Court is asked to decide in the instant case.

1. Nickel Plate is plaintiff in a case now pending in the Court of Claims (Docket No. 385-61) which involves Section 94 of The Technical Amendments Act of 1958.* Section 94 was enacted to afford various forms of retroactive tax relief to railroads (such as the Nickel Plate Road) which, in the early 1940's, had been compelled to change from retirement to straight line depreciation accounting. Section 94(f) created a retroactive right to refund of excess profits taxes by authorizing recomputation of equity invested capital, for each and every prior taxable year, beginning with the year of change in accounting method. Nickel Plate changed its accounting method in 1943, and it is undisputed that recomputation under Section 94(f) of its equity invested capital for 1943 and 1944 entitles it to a refund of 1943-1944 excess profits taxes exceeding $1,500,000, if its claims for refund were timely filed. The Government contends, however, that when Section 94 was enacted, it was already too late for Nickel Plate to file claims thereunder for 1943 and 1944, because the general period of limitations had long since expired.

2. In short, the Government seeks to engraft upon the retroactive relief created by Section 94(f) a qualification—nowhere to be found in the statutory language, and nowhere alluded to in the underlying Congressional hearings or committee reports—that a taxpayer's right to the relief authorized is limited to taxable years which are still open under general periods of limitation.

3. In the instant proceedings, this Court has undertaken to review the Court of Claims' decision in *Zacks* v. *United States*, 280 F. 2d 829. There, as in Nickel Plate's pending case in the Court of Claims, the Government contended that a right to retroactive relief created by statute (Sec-

* Public Law 85-866, 72 Stat. 1606. Section 94 is known as the Retirement-Straight Line Adjustment Act of 1958.

tion 117(q) of the Internal Revenue Code of 1939) was curtailed by general periods of limitation, even though Congress did not see fit to qualify the enabling terms of the statute in that fashion. This construction of Section 117(q) was rejected, and the Government now contends that the Court of Claims erred in so doing.

4. But the Government seeks a far broader ruling here; it seeks the promulgation by this Court of a new and far-reaching principle of statutory construction. Under the proposed principle, Congress would be conclusively presumed to intend that all forms of retroactive relief created by statute shall be limited to years still open under general periods of limitation, unless such a qualification is expressly negated by the terms of the statute. The Government asks this Court to espouse such a sweeping principle of law—which would curtail or extinguish altogether the substantive rights of countless taxpayers to retroactive relief created by statute—without regard to the particular language and legislative history of particular statutory provisions. Yet surely Congress may extend retroactive relief to years closed by general periods of limitation in a variety of ways, and by various forms of expression. And if the intention of Congress to accomplish such a result emerges from the language and legislative history of a particular statutory provision, surely such intent should not be overridden by a conclusive presumption of law founded upon silence, upon the failure of Congress to refer *eo nomine* to general periods of limitation.

5. If, in deciding the instant case, this Court were to adopt the rigid rule of statutory construction advanced by the Government, such a decision would automatically require the Court of Claims to decide Nickel Plate's pending case in favor of the Government. Such a result would necessarily follow, without regard to the differences between Section 117(q) and Section 94 in objectives, statutory language and legislative history, by reason of the single fact that Section 94 does not refer expressly to general periods of limitation.

6. The fate of Nickel Plate and other Section 94 claimants is of great importance not only to themselves but to the Federal revenues; indeed, it would appear from the Government's own Petition for a Writ of Certiorari herein that the construction of Section 94 is the primary object of concern to the taxing authorities. In attempting to demonstrate the importance of the question presented, the Government admits that there are only a "relatively few pending cases" under Section 117(q) itself—and then hurries on to single out Section 94 (referred to as the Retirement-Straight Line Adjustment Act of 1958) as the really important battleground, where "the otherwise barred claims of three taxpayers alone involve an aggregate of over nineteen million dollars * * *." (Pet. 15-16.)

7. Although the construction of Section 94 is encompassed in the issue which this Court is asked to decide, and although it appears that such construction is of primary importance to the Federal revenues, it is evident that this issue will not be adequately presented by petitioner, or respondent. Section 94 looms large in the Government's Petition for a Writ of Certiorari, but it is given short shrift in the Government's brief on the merits. In 45 pages of text, the Government makes but one passing reference (Br. 20) to Section 94. The terms of the provision and a passage from an underlying Congressional committee report are buried in a lengthy appendix (Br. 119-121). As for the forthcoming taxpayer's brief on the merits, it cannot and should not be expected that this brief will be devoted in any substantial part to Section 94; the task of taxpayer's counsel is to defend the Court of Claims' construction of Section 117(q). Hence, unless Nickel Plate is allowed to file its proposed brief *amicus curiae*, which is devoted to a thorough presentation of legal considerations pertinent to the retroactive reach of Section 94, this Court will receive little or no enlightenment on this subject.

8. No questions of fact are raised or discussed by the proposed brief *amicus curiae;* the construction of Section 94 is presented solely as an issue of law, in the context of

facts which have been formally stipulated or otherwise agreed upon. More particularly, Nickel Plate seeks to demonstrate, as a matter of law, that the clear language of Section 94 admits of but one construction with respect to the authorized retroactive recomputation of equity invested capital; and that there is nothing in the underlying Congressional committee reports or hearings to suggest some other construction or to import a latent ambiguity. This was and is Nickel Plate's position in the Court of Claims, and if it is correct, there is no need, of course, to reach questions of fact.

9. The retroactive reach of Section 94(f) is a matter of great moment to many railroads as well as to the Federal revenues, given the very large sums involved. For that reason, and because, in Nickel Plate's view, analysis of the Section 94 issue sheds a strong light on the fallacies inhering in the Government's position herein, we submit that Section 94 should receive this Court's particular scrutiny.

WHEREFORE, upon all of the foregoing grounds, movant requests leave of this Court to file its proposed brief as *amicus curiae* annexed hereto.

Respectfully submitted,

GRANT W. WIPRUD
Attorney for Movant,
602 Transportation Building
Washington 6, D. C.

Of Counsel:

ROBERT T. MOLLOY
602 Transportation Building
Washington 6, D. C.

THOMAS O. BROKER
ROBERT G. BOES
Terminal Tower Building
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INTEREST OF AMICUS CURIAE

The motion for leave to file this brief sets forth in some detail the interest herein of this *amicus curiae* (known to the public and hereafter sometimes referred to as "the Nickel Plate Road"). Briefly, if this Court were to promulgate the far-reaching rule of statutory construction for which the Government contends, it would automatically require a decision against Nickel Plate as plaintiff in a pending case in the Court of Claims which involves the scope of retroactive relief legislation, *i.e.*, Section 94 of The Technical Amendments Act of 1958.[1]

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[1] Public Law 85-866, 72 Stat. 1606. Section 94 is known as the Retirement Straight Line Adjustment Act of 1958.

THE QUESTION PRESENTED BY PETITIONER AND ITS RELATION TO SECTION 94

In substance, the broad issue raised by the Government as petitioner is whether, when Congress enacts retroactive tax relief legislation, the omission of specific reference to periods of limitation should, without more, give rise to a conclusive presumption that retroactivity is limited to years not barred by general periods of limitation.

The retroactive tax relief statute with which this brief is concerned, Section 94 of The Technical Amendments Act of 1958, *supra*, does not make any specific provision with respect to general periods of limitation. The question presented and discussed herein is whether the conclusive presumption for which the Government contends would, or would not, operate to override the clear intent of Congress, if applied to Section 94.

Testing the Government's general thesis in particular relation to Section 94 is warranted by the importance to the Federal revenues of Section 94 claims—an importance singled out for emphasis by the Government in its Petition for a Writ of Certiorari (p. 16)—and by the critical impact which this Court's adoption of the Government's contention would have upon many railroads with Section 94 claims. Moreover, the extreme consequences which could and would flow from this Court's promulgation of the proposed conclusive presumption are illustrated in clear-cut fashion by its application to Section 94, as will appear.

STATUTE INVOLVED

Public Law 85-866, cited as The Technical Amendments Act of 1958:

> Sec. 94. Change from Retirement to Straight Line Method of Computing Depreciation in Certain Cases.
>
> (a) SHORT TITLE.—This section may be cited as the "Retirement-Straight Line Adjustment Act of 1958".

(b) MAKING OF ELECTION.—Any taxpayer who held retirement-straight line property on his 1956 adjustment date may elect to have this section apply. Such an election shall be made at such time and in such manner as the Secretary shall prescribe. Any election under this section shall be irrevocable and shall apply to all retirement-straight line property as hereinafter provided in this section (including such property for periods when held by predecessors of the taxpayer).

(c) RETIREMENT-STRAIGHT LINE PROPERTY DEFINED.—For purposes of this section, the term "retirement-straight line property" means any property of a kind or class with respect to which the taxpayer or a predecessor (under the terms and conditions prescribed for him by the Commissioner) for any taxable year beginning after December 31, 1940, and before January 1, 1956, changed from the retirement to the straight line method of computing the allowance of deductions for depreciation.

(d) BASIS ADJUSTMENTS AS OF 1956 ADJUSTMENT DATE.—If the taxpayer has made an election under this section, then in determining the adjusted basis on his 1956 adjustment date of all retirement-straight line property held by the taxpayer, in lieu of the adjustments for depreciation provided in section 1016 (a) (2) and (3) of the Internal Revenue Code of 1954, the following adjustments shall be made (effective as of his 1956 adjustment date) in respect of all periods before the 1956 adjustment date:

(1) DEPRECIATION SUSTAINED BEFORE MARCH 1, 1913.—For depreciation sustained before March 1, 1913, on retirement-straight line property held by the taxpayer or a predecessor on such date for which cost was or is claimed as basis and which either—

(A) RETIRED BEFORE CHANGEOVER.—Was retired by the taxpayer or a predecessor before the changeover date, but only if (i) a deduction was allowed in computing net income by reason of such retirement, and (ii) such deduction was computed on the basis of cost without adjustment for depreciation sustained before March 1, 1913. In the case of any

such property retired during any taxable year beginning after December 31, 1929, the adjustment under this subparagraph shall not exceed that portion of the amount attributable to depreciation sustained before March 1, 1913, which resulted (by reason of the deduction so allowed) in a reduction in taxes under the Internal Revenue Code of 1954 or prior income, war-profits, or excess-profits tax laws.

(B) HELD ON CHANGEOVER DATE.—Was held by the taxpayer or a predecessor on the changeover date. This subparagraph shall not apply to property to which paragraph (2) applies.

The adjustment determined under this paragraph shall be allocated (in the manner prescribed by the Secretary) among all retirement-straight line property held by the taxpayer on his 1956 adjustment date.

(2) PROPERTY DISPOSED OF AFTER CHANGEOVER AND BEFORE 1956 ADJUSTMENT DATE.—For that portion of the reserve prescribed by the Commissioner in connection with the changeover which was applicable to property—

(A) sold, or

(B) with respect to which a deduction was allowed for Federal income tax purposes by reason of casualty or "abnormal" retirement in the nature of special obsolescence,

if such sale occurred in, or such deduction was allowed for, a period on or after the changeover date and before the taxpayer's 1956 adjustment date.

(3) DEPRECIATION ALLOWABLE FROM CHANGEOVER TO 1956 ADJUSTMENT DATE.—For depreciation allowable, under the terms and conditions prescribed by the Commissioner in connection with the changeover, for all periods on and after the changeover date and before the taxpayer's 1956 adjustment date.

This subsection shall apply only with respect to taxable years beginning after December 31, 1955.

(e) EFFECT ON PERIOD FROM CHANGEOVER TO 1956 ADJUSTMENT DATE.—If the taxpayer has made an election under this section, then in determining

the adjusted basis of any retirement-straight line property as of any time on or after the changeover date and before the taxpayer's 1956 adjustment date, in lieu of the adjustments for depreciation provided in section 1016 (a) (2) and (3) of the Internal Revenue Code of 1954 and the corresponding provisions of prior revenue laws, the following adjustments shall be made:

(1) FOR PRESCRIBED RESERVE.—For the amount of the reserve prescribed by the Commissioner in connection with the changeover.

(2) FOR ALLOWABLE DEPRECIATION.—For the depreciation allowable under the terms and conditions prescribed by the Commissioner in connection with the changeover.

This subsection shall not apply in determining adjusted basis for purposes of section 437 (c) of the Internal Revenue Code of 1939. This subsection shall apply only with respect to taxable years beginning on or after the changeover date and before the taxpayer's 1956 adjustment date.

(f) EQUITY INVESTED CAPITAL, ETC.—If an election is made under this section, then (notwithstanding the terms and conditions prescribed by the Commissioner in connection with the changeover)—

(1) EQUITY INVESTED CAPITAL.—In determining equity invested capital under section 458 and 718 of the Internal Revenue Code of 1939, accumulated earnings and profits as of the changeover date, and as of the beginning of each taxable year thereafter, shall be reduced by the depreciation sustained before March 1, 1913, as computed under subsection (d) (1) (B); * * *

ARGUMENT

THE RETROACTIVE REACH OF SECTION 94 (f) IS CLEARLY INDEPENDENT OF GENERAL PERIODS OF LIMITATION, AND ANY INFERENCE OR PRESUMPTION TO THE CONTRARY WOULD BE ERRONEOUS, AS A MATTER OF LAW

I. The Problem Which Section 94 Was Enacted to Resolve

The object of this brief is to demonstrate that, as a matter of law, the retroactive scope of Section 94(f) is independent of general periods of limitation; indeed, that the tax relief afforded by that provision necessarily reaches far back into years otherwise closed to the great majority of railroads entitled to such relief.

At the outset, however, it is necessary to acquaint this Court in brief compass with the origins and development of the problem with which Congress dealt in enacting Section 94. The account given below summarizes undisputed facts drawn in great part from two short documents, printed herein as Appendix A and Appendix B, respectively: (1) An introductory passage in the Senate Report underlying Section 94 as enacted; and (2) The stipulation of facts in Nickel Plate's pending Court of Claims case, Docket No. 385-61.

Prior to 1942, class I railroads (including Nickel Plate) had for many years employed the retirement method of accounting with respect to certain roadway properties, both in reporting to the Interstate Commerce Commission (hereinafter referred to as "the ICC") and in computing depreciation for income tax purposes. Under the retirement method, depreciation is not taken year by year; instead, the original cost of an asset (less salvage value) is charged off against income for the year in which the asset is retired from use. In 1942, the ICC ordered all class I railroads to change, not later than January 1, 1943, from the retirement method to the straight-line method of accounting, whereunder the roadway properties involved would be written off by annual depreciation deductions geared to the useful lives of the properties.

Most of the railroads affected by the ICC order (including Nickel Plate) felt compelled to change their accounting for Federal income tax purposes to conform with the new ICC accounting, and therefore sought the consent of the Commissioner of Internal Revenue (as required by the tax laws) to make such a change. Permission was granted by the Commissioner, but only on the condition that the railroads making the change agree to establish an arbitrary reserve of 30 per cent, to reflect what the Commissioner deemed to be past-accrued depreciation on the roadway properties involved.

The Commissioner granted his conditional consent in virtually identical "terms letters" addressed severally to the applicant railroads, and these railroads were required to agree in writing to abide by all provisions of the terms letters. One major requirement of the terms letters was that the arbitrary 30 per cent reserve should, in effect, be subtracted from the remaining amount of basis which could be recovered through depreciation. A second major requirement of the terms letters was that accumulated earnings and profits, as of the effective date of changeover in tax accounting method, be reduced by the 30 per cent reserve. The resulting adjustment of equity invested capital, as computed under the World War II and Korean War excess profits tax laws, served to reduce the excess profits credit and increase the excess profits tax liability of the railroads making the changeover.

The applicant railroads (including Nickel Plate) protested that the conditions imposed by the terms letters were onerous and inequitable, but many of them (including Nickel Plate) finally agreed in writing to abide by such conditions, as the price of employing the same accounting method both for ICC reports and income tax returns. The resultant changeovers in accounting method took place, generally, during 1942 and 1943. Nickel Plate's changeover, under its terms letter and its consent thereto, was effective January 1, 1943.

Thereafter, a few of the railroads involved refused to abide by the conditions of the terms letters, challenging them in the courts; and such action operated, of course, to extend the general period of limitations for recovery of refunds by the litigating roads. However, the other railroads (including Nickel Plate) honored their commitments to the Commissioner, pending relief legislation. Thus, beginning with the year of changeover, Nickel Plate and many other roads developed their accumulated earnings and profits, computed their equity invested capital and paid their excess profits taxes in accordance with the conditions of the terms letters. For such roads, of course, the general period of limitations for filing claims for refund, as prescribed by Section 322 of the 1939 Internal Revenue Code and Section 6511 of the 1954 Internal Revenue Code, had long since expired with respect to many taxable years after the changover, when Section 94 was enacted in 1958.

As recited in the excerpt from the Senate committee report underlying Section 94 (Appendix A, *infra*), litigation involving the terms letters had cast some doubt on the validity of the 30 per cent reserve requirements; and the basic purpose of Section 94 was to resolve the continuing controversy over such requirements between the railroads and the Internal Revenue Service.

Within two years after the enactment of Section 94, the roads which had abided by the terms letters until they were abrogated by the new legislation (including Nickel Plate) filed claims for refund of excess profits taxes for years beginning with the year of changeover. The Commissioner, however, disallowed such claims as to all early years on the ground that they were barred by expiration of the general period of limitations. Nickel Plate's pending case in the Court of Claims involves the Commissioner's determination that its claims for refund of excess profits taxes for 1943 and 1944 were not timely filed because the general period of limitations for those years had expired—long before Section 94 was enacted.

II. The Statute and the Underlying Congressional Committee Reports and Hearings

Section 94 of the Technical Amendments Act of 1958, *supra*, abrogated the arbitrary and onerous 30 per cent reserve requirements of the terms letters and authorized the substitution of a much lower reserve for tax accounting purposes. There is a significant dichotomy, however, in the provisions for retroactivity of the tax relief thus enacted.

In authorizing the substitution of the new, lower reserve, Congress afforded relief to the railroads in the form of major increases in depreciation allowances. But Congress manifested its concern with the impact of such increases on the revenues by expressly providing that, with respect to depreciation allowances, the substituted reserve could be utilized only for years beginning on or after January 1, 1956. In other words, only a very limited retroactivity was permitted by Section 94 in this regard.

However, for the purpose of excess profits tax relief, Congress did not choose to limit retroactivity in the same fashion. To the contrary, in Section 94(f)(1), *supra*, Congress expressly and unqualifiedly authorized the utilization of the new reserve in the recomputation of accumulated earnings and profits, and thence of the equity invested capital—

> as of the changeover date [January 1, 1943 for Nickel Plate and in the early 1940's for other roads], *and as of the beginning of each taxable year thereafter* • • •. [Emphasis supplied].

We submit that Section 94(f)(1) could scarcely be more explicit or precise in defining the retroactive scope of the relief afforded with respect to excess profits taxes. Retroactive recomputations are categorically authorized, not only as of the railroads' changeover dates in the early 1940's, but as of the beginning of each and every taxable year thereafter. Surely Congress did not intend to authorize such retroactive annual recomputations as a mere

academic exercise; it must have intended such retroactive adjustments to have practical tax consequences, i.e., the redetermination and refund, in part or in whole, of World War II and Korean War excess profits taxes. Nor does the unqualified language of the statute suggest or permit a discriminatory construction which would allow the authorized retroactive relief only to the few railroads which had litigated the terms letters at an early date, and deny the same relief to the many roads which had honored their commitment to abide by the terms letters. Yet such a discrimination is imputed to Congress by the Government's contention that, *sub silentio*, Congress intended Section 94(f)(1) to apply retroactively only to years not otherwise barred by general periods of limitation.

That Congress meant exactly what it said in Section 94(f)(1), without any silent reservations, is confirmed by the intention expressed in the underlying Senate Finance Committee Report to eliminate completely the inequitable duplication under the terms letters of earlier adjustments of equity invested capital. Thus, the Committee declared forthrightly that (S. Rep. No. 1983, 85th Cong., 2d Sess. pp. 247-248 (1958-3 Cum. Bull. 1168-1169)):

> These adjustments in accumulated earnings and profits are to be made notwithstanding the terms and conditions prescribed by the Commissioner of Internal Revenue in connection with the changeover to the straight line method of computing depreciation.
>
> * * * *
>
> Any further reduction of accumulated earnings and profits under section 458 and section 718 of the 1939 Code to reflect such depreciation would constitute *a double adjustment in the computation of the taxpayer's equity invested capital.* [Emphasis supplied.]

As against the affirmative intent evidenced by the above-quoted declarations voiced by the Senate Finance Committee, there is not one passage, one sentence, one phrase, within the four corners of either Congressional committee report, or in the reports of the hearings, which states or

suggests that Congress intended to engraft any unwritten limitation upon the retroactive relief provided by Section 94(f).

We are remitted, then, to the best and most conclusive evidence of what Congress intended: the explicit and categorical provision of Section 94(f)(1) that excess profits tax relief for the railroads shall extend retroactively to the date of changeover, through year-by-year adjustments of equity invested capital beginning with the date of changeover.

Nevertheless, if this Court were to adopt the broad conclusive presumption of law advocated by the Government, the clear terms of Section 94(f) and their support in legislative history would be of no avail to Nickel Plate and many other railroads similarly situated. A single act of omission and not of commission on the part of Congress would require the attribution to Congress of an intent to limit the retroactive relief afforded by Section 94(f) to years not otherwise barred by general limitations statutes.

Without more, we submit that application to Section 94(f) of the proposed presumption would, beyond peradventure, override the clearly-expressed intention of Congress. And if this be true with respect to Section 94(f), how can the courts determine the retroactive scope of any tax relief legislation without examining its terms and legislative history?

In the proposed conclusive presumption, the Government has fashioned a Procrusteah bed into which it would force every piece of tax relief legislation, regardless of the distortions involved. This, of course, would simplify in favor of the Commissioner a recurring problem of statutory construction; but we cannot believe that this Court will indorse such simplification at the expense of depriving particular taxpayers of particular rights conferred upon them by particular tax relief legislation.

III. The Decided Cases

In its brief on the merits in the instant case, the Government makes two contentions which, among others, are advanced in derogation of the rationale of cases which directly support Nickel Plate's construction of Section 94(f). The Government contends (Br. 14-15) that Congress cannot retroactively extend tax relief to years closed by general periods of limitation, without specifically acknowledging and declaring that it is doing so; otherwise, it is asserted, there is a prohibited repeal by implication of a prior statute, i.e., the general limitations statute. The Government also contends, in closing its brief (pp. 41-45), that it is immaterial whether tax relief legislation be deemed to create new rights or to confirm existing rights.

The first contention is surely a strained and specious invocation of a rule of statutory construction. If the Government were right, the general limitations statute has been repealed many times over. It is obvious, however, that at the most a retroactive relief statute creates an exception to the general period of limitations. And the revenue laws are replete with provisions which, without saying so, make exceptions to other, more general provisions. The second Government contention referred to above is equally strained and unsound. The Government dismisses any distinction between statutes creating rights and statutes confirming rights on the grounds that it is often difficult to tell the difference, and that certain decided cases betray this difficulty. But the fact that many problems of statutory construction are difficult does not mean that, if they are ignored, they will go away. And the Government's purported indifference to the distinction between new rights and confirmed rights is belied by its account (Br. 32-37) of the confused and complex background of Section 117(q)—an account obviously designed to persuade the reader that the enactment of Section 117(q) did no more, for the most part, than confirm existing rights or hasten tax relief already on the way.

Whatever the situation with respect to other retroactive tax relief legislation, it is surely clear that Section 94(f) created a new retroactive right, in abrogation of the terms letter obligations fastened upon the railroads by the Commissioner. And the distinction between such a new right and a mere confirmation of existing rights becomes strikingly meaningful in the light of a well-reasoned line of authority, which, as will appear, also avoids any possible conflict with general periods of limitation.

The line of authority referred to consists of Court of Claims decisions running from *Verckler* v. *United States*, 170 F. Supp. 802, via *Zacks* v. *United States*, 280 F. 2d 829, *Lorenz* v. *United States*, 296 F. 2d 746, to *Eastman Kodak Co.* v. *United States*, 292 F. 2d 901. In these cases, the Court of Claims had to deal with tax relief statutes which, like Section 94(f), were retroactive in terms to years which were closed under general periods of limitation, although Congress failed to acknowledge or specify that such closed years should be opened. As to the closed years involved in those cases, the Court of Claims took note of the fact that the taxes for such years were in the first instance legally and properly due; that only by force of the retroactive relief legislation did the original tax payments become, retroactively, erroneous and illegal overpayments. And the court reasoned that Congress, having created a new statutory right to recover such retroactively-created overpayments of tax, could not have intended that such relief be defeated by the bar of general periods of limitation absent an express qualification to that effect.

The Court of Claims' solution to the problem, in the above-cited cases, is to regard the date of retroactive relief legislation, creating new rights, as the date of constructive "payment" of all taxes theretofore paid, so far as within the retroactive scope of the statute, with the normal period of limitations running from the date of enactment and constructive "payment".

Thus in *Verckler* v. *United States*, *supra*, the court held that the retroactive amendment of 1939 Code provisions

dealing with estate taxes operated to create a new right or cause of action, and that a claim for refund within two years of such enactment was timely. The court held (pp. 804, 806):

> Not until February 20, 1956, when P.L. 417 came into effect, did plaintiff have a right to claim and receive refund of the tax. This was not a claim for taxes previously erroneously or illegally collected, but an election to receive the benefits of a relief statute.
>
> • • •
>
> In summary, P.L. 417 created a cause of action based upon the payment of an illegal and erroneous estate tax; the payment constructively arose as of the date the law was improved; section 910 of the 1939 Code became operative as a limitation period for filing a claim as of that date and not as of the date the previously legally assessed tax was paid.

This Court properly pointed out that to hold otherwise (p. 805):

> This would necessarily reward taxpayers who delay payment of their estate tax while at the same time denying similar treatment to those who meet their responsibilities with celerity.

The *Verckler* rationale was subsequently applied by the Court of Claims in *Zacks* and *Lorenz*, and has been recently well-summarized in *Eastman Kodak Co.* v. *United States*, *supra*, as follows (p. 904):

> We therefore hold that taxes become "erroneously • • • collected" even though when paid, they were due and owing, if thereafter, by reason of a readjustment of price, or a retroactive tax reduction statute, or a recomputation of profits by renegotiation, the taxpayer becomes legally entitled to get them back. From that time, he must be alert to his rights, as other taxpayers must be, and must, within the rather generous periods provided by the statutes, file his claim with the tax authorities.

At page 905, this Court referred to "the development of the *Verckler-Zacks* doctrine" as assurance against hard-

ship where the taxpayer pursues the claim within the specified time after the constructive overpayment of the tax, i.e., after the creation of the cause of action by remedial legislation.

We submit that this is an eminently reasonable solution where a new right or cause of action is created, retroactively extending into years otherwise closed, but Congress has failed, for one reason or another, to specify that closed years shall be opened or to provide a new period of limitations for securing relief under the statute. So construed, Section 94(f) clearly provides retroactive relief for closed years—in keeping with the equally clear intent of Congress.

CONCLUSION

For all of the foregoing reasons, this *amicus curiae* respectfully submits that Section 94(f), as a matter of law, affords retroactive relief for years otherwise closed by general periods of limitation; and that the conclusive presumption advocated by the Government would erroneously and illegally override the clear intent of Congress and the proper construction of the statute.

Respectfully submitted,

GRANT W. WIPRUD
Attorney for Amicus Curiae
602 Transportation Building
Washington 6, D. C.

Of Counsel:

ROBERT T. MOLLOY
602 Transportation Building
Washington 6, D. C.
THOMAS O. BROKER
ROBERT G. BOES
Terminal Tower Building
Cleveland 1, Ohio

APPENDIX A

Excerpt From Senate Finance Committee Report Underlying the Enactment of Section 94:
(S. Rep. No. 1983, 85th Cong., 2d Sess. 108, 1958-3 Cum. Bull. 1028-1029.)

* * * *

Prior to 1942, class I railroads for many years employed the retirement method of computing depreciation on roadway assets for income-tax purposes, as well as reporting to the Interstate Commerce Commission on this basis. These roadway assets include buildings, bridges, tunnels, water towers, etc., but not the rolling stock, roadbed, or the track. Instead of taking depreciation as the asset is used, under the retirement method, the original cost of an asset (less salvage value) is charged off against income at the time of the retirement of the asset from use. In 1942, the Interstate Commerce Commission ordered class I railroads to change, not later than January 1, 1943, from the retirement method of computing depreciation on roadway assets to the straight-line method. Under the straight-line method of computing depreciation, the original cost of an asset (less salvage value) is charged against income by means of annual deductions over its useful life.

Because of the Interstate Commerce Commission's order, and because during World War II these assets were needed and, therefore, were not retired and charged off against income, the railroads asked the Commissioner of Internal Revenue to permit them to change over, for income-tax purposes, to the straight-line method of computing depreciation. Permission was granted, but only on the condition that the railroads establish a reserve generally of 30 percent of the cost of the roadway assets. The effect of this reserve was to limit the remaining amount which could be recovered by depreciation to the cost of these assets reduced by the 30-percent reserve. Although the railroads objected to this condition, many of them finally agreed to the establishment of this reserve imposed by the

so-called terms letters. The changeovers to the new method of computing depreciation occurred, generally, in 1942 and 1943. A number of court decisions have dealt with the tax effects of the retirement method of computing depreciation and with the tax effects in changing from this method of depreciation to another. These decisions relate to a number of different issues and involve widely varying factual situations. They have, however, thrown some doubt upon the validity of the 30-percent reserve requirement imposed upon the railroads under the terms letters. As a result, the railroads and the Internal Revenue Service have been engaged in a continuing controversy over the tax effects of this change in method of computing depreciation. The amendment made by the House bill is, in essence, a settlement of this controversy.

In the House debate on this bill, it was pointed out that, if the Internal Revenue Service failed to sustain its position in court with respect to the legality of these reserves, it has been estimated that there might be a revenue loss of as much as $273 million for the years 1943 through 1955 and that, for the period 1956 to 1995, there might be a total additional reduction in income taxes of approximately $50 million more than under the provision adopted by the House.

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APPENDIX B

Stipulation of Facts in Nickel Plate's Pending Court of Claims Case, Docket No. 385-61

The following stipulation is set forth verbatim in the Pretrail Conference Memorandum filed on June 25, 1962, in Nickel Plate's pending case in the Court of Claims, Docket No. 385-61; and the facts thus stipulated are incorporated in the Report of the Commissioner filed in said case on July 23, 1962.

1. The plaintiff is a domestic railroad corporation, subject to the jurisdiction of the Interstate Commerce Commission, with principal offices in the Terminal

Tower Building, Cleveland, Ohio, and has at all pertinent times followed the accrual method of accounting and is the owner of the claims here sued upon.

2. Plaintiff timely filed its excess profits tax returns on the accrual basis for the calendar years 1943 and 1944 with the Collector of Internal Revenue at Cleveland, Ohio, and paid excess profits taxes, not refunded or credited, in excess of the refunds here claimed.

3. As a condition to permission to change from the retirement method of accounting with respect to its depreciable road property to the straight line method of depreciation accounting as of January 1, 1943, the Commissioner of Internal Revenue required plaintiff to agree, *inter alia*, that the prescribed 30% reserve for past depreciation would be used not only for depreciation accounting purposes but to reduce accumulated earnings and profits in the determination of plaintiff's invested capital for excess profits tax purposes. Plaintiff's accumulated earnings and profits were developed and its excess profits tax returns for the years here pertinent were filed in accordance with the then existing ruling of the Internal Revenue Service as set forth in the said terms letter. It is agreed that the terms letter correctly embodies the terms and conditions of the said changeover; that Exhibits A and B of the petition are true copies of the said terms letter and of the plaintiff's acceptance letter; and that said exhibits are incorporated herein by reference.

4. In Section 94 of Public Law 85-866, the so-called Technical Amendments Act of 1958, which was enacted on September 2, 1958, Congress provided for an election by certain taxpayers to reduce the above specified 30% reserve for past depreciation in a manner prescribed therein. Section 94(f) (1) provided affected taxpayers with the basis for recomputation of excess profits taxes previously paid by authorizing the recomputation of accumulated earnings and profits in the manner therein prescribed in determining the equity invested capital under Section 718 of the 1939 Code as of the changover date and as of the beginning of each taxable year thereafter. Under date of October 13, 1959, the final regulations under Section 94 were

promulgated. On or about November 19, 1959, plaintiff filed an election, claiming the benefits of Section 94.

5. On or about August 1, 1960, and within two years of the enactment of the aforesaid legislation, but after the expiration of the period specified in Section 322(b)(1) of the Internal Revenue Code of 1939 or Section 6511 of the Internal Revenue Code of 1954, plaintiff filed formal claims for refund of the aforesaid taxes, which claims were based upon facts and grounds substantially in accord with those herein sued upon. No other claims have been filed covering the relief sought. Formal action disallowing the said claims was taken by the Commissioner's delegate under date of September 8, 1961. This suit was filed within two years of said disallowance.

6. It is further stipulated and agreed that the case may be submitted to the Court, on briefs and argument, on the legal issue as to whether the claims referred to in Paragraph 5 above were timely filed. If it is held that timely claims were filed, plaintiff is entitled to recompute its accumulated earnings and profits for the years here involved (1943 and 1944, including the effect thereon of any carrybacks properly allowable from 1945 and 1946 of unused excess profits credits) in the manner specified in said Section 94(f)(1), thus increasing its excess profits credits for the pertinent years and entitling it to a refund of excess profits tax paid for the said years, together with interest as provided by law, the amount of which is to be determined under Rule 38(c). It is understood and agreed that the right is reserved to introduce additional factual proof if necessary in any such proceedings to establish the amount of recovery. It is further stipulated and agreed that if it is held the claims referred to in Paragraph 5 above were not timely filed, this suit shall be dismissed with prejudice.